Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-331

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEW MEXICO, ET AL., PETITIONERS

v.

MESCALERO APACHE TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a State may superimpose its fish and game laws on hunting and fishing by non-Indians on tribal lands within an Indian Reservation, where the Tribe extensively regulates those activities and has developed the wildlife resource with substantial federal aid, but none from the State, and the Tribe's program has no significant impact off the Reservation.

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The interest of the United States in this case arises from its special relationship with the Indian Tribes, its obligation to implement a treaty, Executive Orders setting aside the Mescalero Reservation, and Congressional legislation encouraging tribal self-government and economic self-sufficiency, as well as the substantial involvement of the federal government with the tribal enterprise immediately involved.

STATEMENT

1. The Mescalero Apache Tribe, with more than 2,000 members, is a federally-recognized Indian tribe, governed by a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. 461 *et seq.* The Mescalero are a branch of the Apache Nation which entered into a Treaty with the United States on July 1, 1852. 10 Stat. 979; J.A. 28a-33a. Under Article 1 of the Treaty (J.A.

29a), the Apache acknowledged that they were "exclusively under the laws, jurisdiction and government of the United States." By Article 9 (J.A. 30-31a), the United States promised to "designate, settle, and adjust" the territorial boundaries of the Apache.

The Reservation now occupied by the Mescalero Tribe in south central New Mexico was created by a succession of Executive Orders promulgated in the 1870s and 1880s. 1 Kappler, *Indian Affairs, Law and Treaties* 870-873 (1904), J.A. 34a-40a.[1] It is a small portion of the aboriginal Mescalero domain (1978 Tr. 38; J.A. 184a),[2] which once encompassed most of southern New Mexico between the Rio Grande and Pecos Rivers, as well as a sizable triangle east of the Pecos. See *Mescalero Apache Tribe* v. *United States*, 17 Ind. Cl. Comm. 100, 146-148, 159-161 (1966). The present Reservation comprises more than 460,000 acres and, according to 1982 figures, the Tribe owns all but 193.85 acres.[3] The 1980 census indi-

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[1] The final boundaries were fixed by the Executive Order of Mar. 24, 1883 (J.A. 38a-39a). Later, portions of the Reservation were briefly included in a National Forest, but that area was restored to the Mescalero Reservation by the Executive Order of Feb. 17, 1912 (J.A. 39a-40a). An intervening Executive Order of Mar. 1, 1910 (J.A. 39a) exempted from the Reservation two "small holdings claims" on the Tularosa River totalling approximately 262 acres, apparently representing settlements located before the establishment of the Reservation. The Tribe has since purchased all but 23.8 acres of the lands covered by these claims. See also note 3, *infra*.

[2] Two hearings were held before the district court, one on August 19, 1977, and the second on April 25, 1978. The transcripts of these hearings will be cited as "1977 Tr." and "1978 Tr.", respectively, and, as to portions reprinted in the Joint Appendix, also to the page of the J.A.

[3] These lands comprise: (1) the 23.8 acres remaining of the "small holdings claims" exempted from the Reservation in 1910 (see note 1, *supra*); 10 acres at the Mescalero Agency granted to St. Joseph's Catholic Church by the Act of Mar. 29, 1928, ch. 299, 45 Stat. 1716; and the unimproved and unoccupied 160 acre "Dodson Tract" in the northwest portion of the Reservation. The State has

cates a non-Indian population of 179 (including resident federal employees of the Bureau of Indian Affairs and the Indian Health Service), out of a total of more than 2,000.

2. Recently, the Tribe has undertaken a substantial effort to develop tourism on the Reservation, partially in order to offset an anticipated decline in the income derived from lumbering enterprises (1977 Tr. 10-13, 56-58; J.A. 113a-117a, 143a). This has included construction of a resort complex, the Inn of Mountain Gods, which consists of a hotel, stocked lake, golf course, tennis courts, and a swimming pool (Br. in Opp. App. 6a-10a).[4] Construction of the complex was financed primarily by federal funds (*id.* at 7a-8a).

As an integral part of its tourism program, the Tribe has developed its hunting and fishing resources. In addition to the sale of licenses alone (Br. in Opp. App. 11a), the Tribe also sells "package hunts" which include both tribal licenses to kill big game, and accommodations at the Inn (*id.* at 9a). The sale of licenses alone and the sale of package hunts, in turn, generate ancillary income from family members who stay at the Inn, but do not hunt or fish (1977 Tr. 57; J.A. 143a). The tourism program provides employment for Tribe members and creates income for the Tribe which is used to maintain the tribal government and provide services to Tribe members (1977 Tr. 13; J.A. 115a). Income derived from the sale of tribal hunting and fishing licenses, package hunts, and campground and picnicking permits totalled $269,140.00 in 1976 and $271,520.00 in 1977 (Br. in Opp. App. 37a).

Fishing resources located on the Reservation were created almost entirely by the Tribe and the United States. Because there were no natural lakes on the Reservation,

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not suggested that any of the hunting or fishing at issue here occurs on these small parcels.

[4] In addition to the evidence presented at the two hearings, the parties entered into a stipulation, reproduced as an appendix to the Tribe's Brief in Opposition. We cite to that appendix as "Br. in Opp. App."

eight artificial lakes were developed, using federal funds (Br. in Opp. App. 13a; 1977 Tr. 11; J.A. 114a). These lakes are stocked with fish from a federal hatchery located on the Reservation (Br. in Opp. App. 12a-13a, 14a). The State has never stocked lakes on the Reservation, although before 1976 the State had stocked part of one Reservation stream and prior to 1970 it stocked more than one stream (*id.* at 14a). At present, however, all waters on the Reservation are stocked exclusively with fish from the federal hatchery (*ibid.*). The State contributes nothing to the operation of the hatchery, nor does it help maintain the artificial lakes (1977 Tr. 15; J.A. 117a).

Game on the Reservation includes elk, antelope, bear and deer. From "time immemorial" the Tribe has been concerned about wild game on its land (1977 Tr. 7; J.A. 110a). The Tribe is interested in the "protection and preservation" of the game and in generating income from this resource (1977 Tr. 10; J.A. 113a). The antelope living on the Reservation are non-migratory and seldom, if ever venture beyond Reservation boundaries (Br. in Opp. App. 15a). Portions of the deer, elk and bear populations, however, do range on and off the Reservation throughout the year (*id.* at 15a). William S. Huey, New Mexico's director of Fish and Game, testified that there has been no adverse impact on the State's game program caused by the migrating animals (1978 Tr. 62, 68; J.A. 201a, 206a).

Due to the efforts of the Tribe and the United States, the elk population increased dramatically in the decade between 1967 and 1977 (Br. in Opp. App. 14a-15a). Prior to 1966, only 13 elk lived in the vicinity of the Reservation. In 1966 and 1967, the Tribe released a herd of 162 elk, donated by the National Park Service (*ibid.*). As a result of these efforts, the 1977 elk population numbered approximately 1,200 (*id.* at 15a). The State has made no financial contribution to the development of the elk herd (1977 Tr. 107-108).

3. Pursuant to its constitution, the Tribe, through its tribal council, enacts annual ordinances governing hunting and fishing on the Reservation (*e.g.*, J.A. 76a-87a). These tribal ordinances establish seasons and bag limits and provide for licensing of hunting and fishing on the Reservation (*ibid.*; 1977 Tr. 16-17; J.A. 118a). Since 1977, the ordinances have specified that state hunting and fishing licenses are not required for Indians or non-Indians who hunt or fish on the Reservation (Br. in Opp. App. 10a). The ordinances have been approved by the Department of the Interior (J.A. 92a; Pet. App. 39a). The Tribe employs seven full-time conservation officers to manage the fish and game and to enforce tribal ordinances, all of whom have received training in wildlife management and in law enforcement (Br. in Opp. App. 11a-12a). These officers recommend to the tribal council bag limits and season dates (*ibid.*). In developing recommendations, the Tribe's conservation officers conduct annual game counts and survey game movements (*ibid.*; 1977 Tr. 17, 62-63; J.A. 118a-147a). These surveys are carried out in cooperation with the Bureau of Indian Affairs and the Range Conservation Department (1977 Tr. 63; J.A. 147a). Recommended bag limits are based on conservation needs (1977 Tr. 17; J.A. 118a) and take into account the number of animals the terrain can support (1977 Tr. 70; J.A. 153a). The bag limits and season dates also include consideration of the range utilization of the game animals, of feral horses which roam the Reservation, and of the Tribe's herd of cattle (1977 Tr. 71-74; J.A. 154a-156a). The Tribe has conserved its wildlife resources by turning down many applications for big game licenses and package hunts (Br. in Opp. App. 36a).

The State admits (Br. in Opp. App. 35a) that

> [T]he hunting and fishing ordinances of the Tribe presently maintain the fish and wildlife populations within the Reservation at levels consistent with good management and have not had an adverse impact on fish and wildlife outside the Reservation.

The number of tribal hunting licenses was termed "insignificant" by the State's director of the Fish and Game Department, when compared to the number of state licenses issued (1977 Tr. 113-114). In years past, when state licenses were issued for on-Reservation hunting, elk licenses numbered 50 out of a state total of 14,000; antelope licenses numbered 10 out of 3,500 state-wide licenses; and deer licenses amounted to 175 out of 100,000 state deer licenses (*ibid.*).[5]

4. Conflicts exist between state and tribal hunting regulations. Unlike the State, the Tribe permits one person to purchase an elk license in two consecutive years (Br. in Opp. App. 26a). The State limits its elk licenses in order to spread the opportunity to kill elk among various hunters; its limitation is not related to elk population conservation or management (1978 Tr. 69; J.A. 206a). In 1977, the dates of the Tribe's antelope season varied from the State's antelope season (1977 Tr. 28-31; J.A. 127a-129a). The State's director of its Fish and Game Department testified that "[t]here is no biological significance" in the different antelope season dates (1977 Tr. 96-97). Another difference between regulatory schemes concerns the buck-doe ratio of deer licenses issued (1977 Tr. 71-72; J.A. 153a-154a). While the State permits only buck to be killed, the Tribe allows a hunter to kill a buck and a doe (*ibid.*). This keeps the buck-doe ratio in balance and, in turn, curbs excessive deer population growth (*ibid.*).

At least three persons have been charged by the State for illegal possession of game killed on the Reservation in accordance with tribal law (1977 Tr. 99-100). In 1976, two hunters were fined $600.00 each by the State for possession of a bull elk which had been killed on the Reserva-

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[5] The Tenth Circuit stated that "in a recent year" the Tribe sold 500 deer licenses. Pet. App. 12a n.5. Since the other figures recited appear to derive from the same testimony recited in the text, we assume this was an inadvertant error. At all events, 500 licenses out of 100,000 would remain "insignificant."

tion in compliance with tribal law (1977 Tr. 22, 48-50; Br. in Opp. App. 30a-31a). These two men had purchased tribal hunting licenses in 1975 and 1976, but did not apply for licenses in 1977 (1977 Tr. 60-61; J.A. 145a-146a). News of the fines was carried in the county papers (1977 Tr. 22; J.A. 122a). The Tribe is concerned that state enforcement of conflicting laws will injure the Tribe's reputation, damage its good will, and result in lost income due to a decline in the sale of tribal hunting licenses (1977 Tr. 21-22; J.A. 121a).

5. The State's interest in this case is, at least in part, financial. Federal matching funds through the Pittman-Robinson Act, 16 U.S.C. 669 (hunting), and the Dingle-Johnson Act, 16 U.S.C. 777 (fishing), are allocated to States through a formula which considers the number of license-buyers and the number of acres in the State (Br. in Opp. App. 17a). The territory of the Mescalero Reservation is taken into account in determining New Mexico's share of matching funds (*ibid.*). The number of state-licensed hunters and fishers is also considered in the calculation (*ibid.*). The State has expressed concern that, if state licenses were not required for on-Reservation hunting and fishing, it might lose some federal funds (1977 Tr. 94) and revenue from the sale of state licenses (*ibid.*; 1978 Tr. 53; J.A. 194a). On the other hand, New Mexico stipulated that it has expended no Dingle-Johnson funds for projects within the Reservation during the last six to eight years (Br. in Opp. App. 17a-18a), and it presented no evidence as to expenditures of Pittman-Robinson funds within the Reservation.

6. In 1977, the Tribe filed suit against the State and the director of its Fish and Game Department seeking declaratory and injunctive relief. The Tribe sought to prevent the State from regulating or taxing on-Reservation hunting of fishing by Indians or non-Indians. The district court, on August 2, 1978, ruled in favor of the Tribe. Pet. App. 35a-36a, 37a-53a; J.A. iv-v. The State appealed and the court of appeals affirmed, 630 F.2d 724 (10th Cir.

1980). Pet. App. 8a-34a. New Mexico petitioned for a writ of certiorari and this Court vacated the Tenth Circuit's judgment, 450 U.S. 1036 (1981), and remanded the case to that court for reconsideration in light of *Montana* v. *United States*, 450 U.S. 544 (1981). On remand, the court of appeals again affirmed the district court's decision and ordered its own previous decision reinstated, 677 F.2d 55 (10th Cir. 1982). Pet. App. 2a-3a, 4a-7a. This Court granted New Mexico's second petition for a writ of certiorari on November 15, 1982.

ARGUMENT

INTRODUCTION AND SUMMARY

If argument from the facts alone is ever permissible in this Court, here is such a case. Consider the history underlying this controversy: An Indian Tribe, overwhelmed by the forces of Manifest Destiny and deprived of most of its territory without agreement, is confined to lands of natural beauty but inhospitable and unwanted by white settlers; separated from much of their game range, the members are broken of their free-roaming ways and effectively reduced to beggary.[6] Fortunately, the rugged

[6] The details do not reflect well on the government of the United States or the local authorities of the Territory of New Mexico. In very brief summary, the early history is the following. Shortly after the Mexican Cession of 1848, the Territory of New Mexico was organized (Act of Sept. 9, 1850, ch. 49, 9 Stat. 446), and the Indian Trade and Intercourse Act was extended to the new territory (Act of Feb. 27, 1851, ch. 14, 9 Stat. 574), so that, in principle, aboriginal Indian lands were protected against unauthorized appropriation and trespass. See *Mescalero Apache Tribe* v. *United States*, 17 Ind. Cl. Comm. 100, 112-113 (1966). By the Treaty of 1852 (J.A. 28a-31a), the Apache, including the Mescalero, acknowledged their submission to federal authority in return for a promise of protection and a settlement and recognition of their boundaries. See J.A. 169a-172a. But the Government's undertakings remained unfulfilled and the Mescalero were pursued and defeated. See C.L. Sonnichsen, *The Mescalero Apache* 77-78 (2d ed. 1973); see, also J.A. 173a-174a. Three years later, the subdued Mescalero Tribe signed a further treaty with the United States, ceding most of their

terrain, part mountain, part desert, part rough plain, lacking valuable mineral resources and containing few streams and little desirable farming land, insulates the Reservation both from subdivision by allotment among

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lands in consideration of modest annuities and a defined Reservation several times the size of the present area. J.A. 96a-110a, 174a. That agreement was ineffective, however, never having been ratified. 17 Ind. Cl. Comm. at 115-116. Instead, the most valuable of the Mescalero lands were simply taken without formality or payment by white settlers with the encouragement of the Government, which sometimes lent its military arm to the task. 17 Ind. Cl. Comm. at 142-143. Depredations on both sides continued, the Mescalero were once again reduced and, in 1861, they again agreed to a partial cession of their aboriginal domain, retaining, however, a larger territory than was provided for in the unratified 1855 treaty. 17 Ind. Cl. Comm. at 143. But the agreement was not approved at the higher federal level (*id.* at 143-144) and the decision was taken to confine the Mescalero at the Bosque Redondo, a remote area northeast of the present Reservation with poor land and bad water. J.A. 176a; Sonnichsen, *supra*, at 89-114. Soon, the much more numerous Navajos were sent there as well and conditions became so appalling by the winter of 1865 that the entire Mescalero Tribe determined upon escape. J.A. 176a; Sonnichsen, *supra*, at 115-133; 17 Ind. Cl. Comm. at 117. Finally, in May, 1873, the President formally established a Mescalero Reservation, then comprising about 450 square miles. J.A. 35a-36a, 177a-178a. Thus, without agreement or compensation, the Tribe irrevocably lost all the rest of its territory. 17 Ind. Cl. Comm. at 145. Considerable acreage was added the next year (J.A. 36a) and the boundaries were more accurately defined in 1875 (J.A. 37a). However, valuable mineral deposits were discovered in the northern and western portion of the Reservation and, at the instance of miners and settlers, these areas were severed and about half as much non-mineral land was added on the eastern side by an Executive Order of 1882. J.A. 37a-38a; Sonnichsen, *supra*, at 233-234. The final boundaries were more accurately described in 1883 (J.A. 38a-39a), subject only to the exception from the Reservation of certain small tracts by an Executive Order of 1910. J.A. 39a; see note 1, *supra*. Until the turn of the Century, the Mescalero lived entirely on meager government "rations." Sonnichsen, *supra*, at 230-254. For the next thirty years, the Tribe was deemed "self-sustaining," but the members continued to live in relative poverty, having virtually no control over the revenues that were eventually earned from timber sales and grazing leases. Sonnichsen, *supra*, at 255-269.

members and "opening up" of "surplus" lands to outsiders—so common elsewhere in Indian country—and its tribal status is preserved.[7] Then, very belatedly, the Tribe's "protector" generously contributes money and other help toward several projects, most recently to make possible a tribal enterprise involving a large game and fishing resort; the United States provides an elk herd, a fish hatchery and technical assistance; the State of New Mexico "encourages" the project and "permits" the importation of elk, but makes no tangible contribution, financial or otherwise; the Tribe builds the resort, creates several artificial lakes, develops the game and fishery resource, and successfully organizes a tourist business, committing substantial funds and personnel to the task.

The State concedes that the Tribe's fish and game management is sound and that, in respect of the deer, elk and bear that sometimes migrate off the Reservation, the Tribe's operation creates no adverse impact; indeed, the Tribe's development and conservation of the migrating species only add to the opportunities available to off-Reservation hunters. Nor is it suggested that the State's revenues from off-Reservation huting or fishing licenses are lesened by the Tribe's relatively minimal sale of licenses.[8] Yet, New Mexico—having been permitted to tax the construction of the resort (see *Mescalero Apache*

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[7] See *e.g.*, the report of the Superintendent for 1900, annexed to the Report of the Commissioner of Indian Affairs, *reprinted in Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1900*, H.R. Doc. No. 5, 56th Cong., 2d Sess. 285-291 (1900).

[8] It *is* said that New Mexico's share of Pittman-Robinson Act and Dingle-Johnson Act federal funds is less because the Mescalero Reservation acreage is counted in the apportionment formula while the Tribe's hunting and fishing licenses are not. See Br. in Opp. App. 17a-18a, 23a-25a. However, since the Mescalero Reservation accounts for only .0059 per cent of the total area of the State (*id.* at 24a), the effect is obviously insignificant. At all events, the record indicates that none of these federal funds is spent within the Reservation. *Id.* at 17a-18a.

Tribe v. *O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), cert. denied, 450 U.S. 959 (1981)), as well as the Tribe's income from a neighboring off-Reservation ski operation (see *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973))—now seeks to regulate and tax hunting and fishing by non-Indians on tribal lands within the Reservation; no necessity, no serious justification, no substantial interest, is alleged, except only a claim to share in the revenues. On the other hand, applying State regulation creates needless conflicts with the Tribe's program—in respect to open and closed seasons, bag limits, and the allocation of licenses—which, together with the exaction of State license fees (in addition to those prescribed by the Tribe), predictably will discourage some hunters and fishermen and thereby may substantially diminish tribal revenues.

Even in the absence of governing treaties and statutes and of controlling judicial precedents, applicable in the special context of Indian law, one would suppose that New Mexico had overstepped the line of its legitimate authority and intruded upon insulated activities within the tribal domain which are fully, and quite satisfactorily, regulated by the Tribe, with the help and oversight of the federal government, in a way that excuses the State from any responsibility, gives no cause for concern and offers no pretext for intervention. See, *e.g.*, the Opinion of Justice Powell, concurring in the Court's decision of *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), reported at, *id.* at 173-175; and the Dissenting Opinion of Justice Stevens (joined by Justices Stewart and Rehnquist) in the same case, *id.* at 157-158 and n.7. But this is not merely a case in which the Court is asked "to indulge [its] sympathies." Compare *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831). Not surprisingly, the relevant guidance from the Congress and this Court points to the same conclusion.

There are, we believe, three related grounds of objection to New Mexico's attempted regulation.

A. The first is simply that, when compared to the obvious interest of the Tribe in managing the wildlife on its

lands, including both conservation and the generation of revenues for tribal purposes, and the federal interest in furthering tribal self-government and economic self-sufficiency by aiding and encouraging the tribal enterprise, the State's claim is relatively insignificant. That is especially true here where tribal regulation is comprehensive and concededly sound, federal involvement is substantial, the State makes no contribution, and no adverse effect off the Reservation is identified. Thus, in this case, a "particularized inquiry" into the competing interests of the several governments potentially concerned yields the conclusion that New Mexico's interference is not justified.

B. In the present setting, it is clear that State regulation of non-Indian hunting and fishing on tribal lands within the Reservation would impermissibly infringe the Tribe's sovereign prerogative to govern its territory and manage the affairs of the Reservation. Here, the Tribe itself has determined to manage its wildlife resources and regulate hunting and fishing within tribal lands. It derives substantial revenues from the program, which are used for governmental purposes. The imposition of State regulation produces conflicts and potentially threatens the integrity of the tribal undertaking and the resulting income. Absent Congressional authorization or special justification—wholly lacking in this instance—the tradition of Indian sovereignty shields the Tribe from the State's claim to superimpose its own laws on localized Reservation affairs which are fully and satisfactorily regulated by tribal law.

C. Finally, we stress that the tribal program and the detailed regulations implementing it are expressly sanctioned by federal authority. Congress has authorized Indian tribes to control their wildlife resources and encouraged tribal business enterprises that lead to economic independence. In this case, moreover, the tribal undertaking was largely financed by federal funds and continues to be assisted by federal efforts. And the particular hunting and fishing ordinances have been approved by the De-

partment of the Interior. In these circumstances, tribal regulation enjoys the pre-emptive force of federal law. The comprehensiveness of the tribal hunting and fishing ordinances leaves no room for the State to impose further restrictions or additional burdens.

A. The Minimal State Interest In The Management Of Wildlife Within The Reservation, When Compared To The Predominant Tribal And Federal Interest, Forecloses State Regulation Of Hunting And Fishing On Tribal Lands

This Court has recently directed that when "a State asserts authority over the conduct of non-Indians within [an Indian] reservation," what is called for is "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 144-145. Accordingly, we first examine the relative claims to jurisdiction in the special context presented here.

1. There can be no doubt that governing federal law confirms to the Mescalero Tribe substantial control over the lands and the resources of its Reservation, including its wildlife, and, correspondingly, affords a degree of insulation from State interference.

The Mescalero Reservation, finally defined in 1883, was a long delayed implementation of the promise given to the several Apache Tribes by the Treaty of 1852 that, henceforth, they would be "exclusively under the laws, jurisdiction, and government of the United States" (Art. 1, J.A. 29a), and that the federal government would "at its earliest convenience designate, settle and adjust their territorial boundaries" (Art. 9, J.A. 30a-31a). As New Mexico appears to concede (Pet. Br. 12), when a small portion of the aboriginal Mescalero domain was ultimately "set apart" for the use of the Tribe, its members were confirmed in the exclusive dominion over that diminished Reservation, including its wildlife, subject only to the plenary power of the national sovereign. Nor has that legal regime been altered.

As we have said, the Reservation was neither allotted nor "opened up," and, accordingly, non-Indians were never invited in by Congress and they obtained no rights within the area under the General Allotment Act of 1887 or any special allotment legislation. When New Mexico was admitted to the Union in 1910, it expressly disclaimed "jurisdiction and control" over these and other Indian lands. Enabling Act of June 20, 1910, ch. 310, Section 2, 36 Stat. 557, 558-559. Neither then nor thereafter did the State acquire any lands within the Reservation under the Equal Footing Doctrine, by virtue of Congressional land grants, or otherwise. Accordingly, under the trusteeship of the United States, the Tribe retains full beneficial title to all the lands of its Reservation, with the insignificant exceptions already noted. See notes 1 and 3, *supra*.

Like other Indian Tribes, the Mescalero were confirmed in their "existing powers" by the Indian Reorganization Act in 1934 (25 U.S.C. 476) and encouraged both to revitalize their government by adoption of a constitution and to engage in business enterprises. See *Mescalero Apache Tribe* v. *Jones*, *supra*. Even when the Congress of 1953 permitted States to apply their laws within Reservations, hunting and fishing were exempted. 25 U.S.C. 1321(b); 18 U.S.C. 1162(b). And, in any event, New Mexico has never assumed jurisdiction over the Mescalero Reservation under Public Law 280. See 25 U.S.C. 1321-1324. In 1960, the prerogative of the Tribes to exclude non-Indian hunters and fishermen from their lands, or to admit them on conditions, was reaffirmed and afforded the protection of the federal criminal law. 18 U.S.C. 1165. See *Montana* v. *United States*, 450 U.S. 544, 557, 558-559 (1981). Significantly, that provision—unlike the Indian liquor statute, 18 U.S.C. 1161—does not condition hunting and fishing permitted by the Tribe upon "conformity * * * with the laws of the State." In the last decade, Congress has renewed its endorsement of the "firm federal policy of promoting

tribal self-sufficiency and economic development" and "encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 143, 144. See, also, *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982); *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982), slip op. 7-8. And as recently as three weeks ago, the President reaffirmed the commitment of the Executive Branch to that policy. See the President's January 24, 1983 Statement on Indian Policy in 19 *Weekly Compilation of Presidential Documents* 98 (Jan. 31, 1983).

2. In this legislative context, it is beyond debate that, as beneficial owner of all but a quarter-section of the Reservation lands, the Mescalero Tribe enjoys a federally recognized right to control the wildlife resources of its territory, excluding or admitting non-members as it chooses. Indeed, so much is expressly confirmed by *Montana* v. *United States*, *supra*, the precedent primarily invoked by New Mexico. In the circumstances there presented, it was held that the Crow Tribe could not regulate hunting and fishing on Reservation lands *not* owned by the Tribe or its members. See 450 U.S. at 557-567.[9] There is no such question here. But, as to Indian held lands, the *Montana* Court "readily agree[d]" with the

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[9] Even so, the Court was at pains to stress that the pleadings "did not allege that non-Indian hunting and fishing on [non-Indian] reservation lands [had] impaired [the Tribe's reserved hunting and fishing privileges]" (450 U.S. at 558 n.6), or "that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe" (*id.* at 566), and that the existing record both failed to suggest "that such non-Indian hunting and fishing * * * threaten the Tribe's political or economic security" (*ibid.*) and indicated that the Tribe had "accommodated itself to the State's 'near exclusive' regulation of hunting and fishing on fee lands within the reservation" (*id.* at 566; see, also, *id.* at 564-565 n.13). At the same time, the Court went on to state that, in different circumstances, tribal exercise of retained civil jurisdiction within the Reservation, "even on non-Indian fee lands," would be appropriate. *Id.* at 565-566.

proposition that "the Tribe may prohibit nonmembers from hunting or fishing on lands belonging to the Tribe or held by the United States in trust for the Tribe", and that "if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establish bag and creel limits." 450 U.S. at 557. The Court in *Montana* had no occasion to consider the only real issue here: whether the State may superimpose its own regulatory scheme and exact additional license fees in respect of non-Indian hunting and fishing on tribal lands within a Reservation.

What has already been said, we submit, places a heavy burden on the State to justify any such interference. Indeed, it is meaningless to recognize a Tribe's right to manage wildlife on its lands and to license and regulate non-members invited to hunt or fish there if the State is free to nullify the tribal program by imposing inconsistent or burdensome regulations of its own, or, indeed, to prohibit the activity altogether. We do not say that State interests will never warrant restrictions on hunting and fishing by non-Indians—or even by tribal members—within a Reservation. But we believe such an intrusion must be shown to be necessary because of severely adverse off-Reservation effects that the Tribe is unwilling or unable to prevent.

3. After all, Reservation affairs, including the activities of non-Indians occurring on tribal lands and significantly involving the Indians, traditionally have been the exclusive concern of the tribal and federal governments. See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959); *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U.S. 685, 690 (1965); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170-171 n.6 (1973); *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975); and see *Merrion* v. *Jicarilla Apache Tribe*, *supra*, 455 U.S. at 137-152. At various times and in particular contexts, Congress has varied the rule. But, as we have seen, hunting and fishing is no such exception. In the absence of

special legislation, the State's interest in such activities is largely confined to the effects they may have elsewhere within State boundaries.

In extreme cases, the Reservation situs may not insulate intercourse between Indians and non-Indians from State law when the Tribe—contributing nothing except a sales outlet—is attempting to "export" a tax immunity, thereby depriving the State of substantial revenues it would otherwise earn and prejudicing competing off-Reservation businesses. See *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980). One can readily suggest other situations in which activities on tribal lands would adversely affect neighboring areas so as to implicate State interests. A sufficient example is the creation of serious pollution that reaches beyond Reservation boundaries. So, also, the State would be legitimately concerned if a Tribe's irresponsible conduct threatened the survival of migrating wildlife originating off the Reservation. Even so, it is not clear that the appropriate remedy would not be federal, rather than State, intervention. But, at all events, no such case is presented here.

In this instance, the fish and game are *native* to the Reservation, and, for the most part, would not exist except for the efforts of the Tribe and the United States. Some species never leave tribal lands, and those that occasionally do so merely *add* to the off-Reservation stock, affording otherwise unavailable opportunities to hunters elsewhere and additional license income to the State. Moreover, the Mescalero Tribe, with the assistance of federal agents, *is* conserving the resource through strict regulation, which the State is unable to label inadequate.

We understand New Mexico to concede that where, as here, there are no adverse off-Reservation effects, the State cannot license or regulate the hunting or fishing of tribal members on their Reservation lands—notwithstanding the generalized State interest in all wildlife within its borders, incidental expenditures, or the loss of revenues from licenses and federal matching programs. Yet,

it is argued that once the Tribe invites others to catch the same game and fish, State law becomes fully applicable. This anomaly is not easily understood. Indeed, if the State cannot directly manage Reservation wildlife, it is not apparent that authority to do so indirectly arises merely because non-Indians—most of them not citizens of New Mexico (Br. in Opp. App. 8a)—are licensed by the Tribe to participate in hunting and fishing under tribal regulation. One could as well argue that the Tribe's employment of non-Indians as conservation officers or game wardens would subject the wildlife program to State regulation.

B. State Regulation Of Hunting And Fishing On Reservation Tribal Lands Infringes The Right Of The Tribe To Manage Reservation Affairs

At bottom, New Mexico is refusing to acknowledge that Indian Tribes "are a good deal more than 'private, voluntary organizations'" (*United States* v. *Mazurie*, *supra*, 419 U.S. at 557), and that tribal sovereignty within a Reservation is not merely a landowner's right to exclude intruders or to charge them a fee for the privilege of entering. *Merrion* v. *Jicarilla Apache Tribe*, *supra*, 455 U.S. at 136-148. If anything is firmly settled in this Court, it is that Indian Tribes do enjoy *governmental* powers with respect to their territory, including a measure of regulatory authority over non-members who are permitted to enter for business or other purposes. In some circumstances, such invitees will be immune even from State taxes on their Reservation transactions. *E.g.*, *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, *supra*; *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160 (1980); *White Mountain Apache Tribe* v. *Bracker*, *supra*; *Warren Trading Post Co.* v. *Arizona Tax Commission*, *supra*. To be sure, this is not always so. *E.g.*, *Washington* v. *Confederated Tribes*, *supra*. But New Mexico insists that it is *regulating*, not taxing (Pet. Br. 18 n.5), and, absent special Congressional consent or

clear necessity, we are not aware that this Court has ever condoned a State attempt to *regulate* the activities of non-Indians in their intercourse with a Tribe on tribal Reservation lands.

The reason is obvious. At least in a context like the one presented here, duplicative regulation is far more intrusive than double taxation. As in this case, conflicts are inherently likely. In truth, to concede State power to regulate the same activity already governed by tribal law is to deny the Tribe any meaningful authority over its territory. Especially is this so when the subject of regulation is not an isolated transaction, but, rather, a continuing Reservation-wide program requiring comprehensive and consistent administration.

At all events, it hardly requires elaborate argument to show that granting the State an effective veto over a Tribe's management of its wildlife operations on its own lands is a substantial interference with tribal governmental prerogatives. Here we deal with a most traditional concern of tribal communities. It is, of course, no ground of objection that a Tribe has copied the white man's ways of husbanding the resource, enacting detailed regulations, and organizing a successful commercial venture. That is what Congress has encouraged at least since 1934. On the contrary, the infringement is all the more severe when, as here, the Tribe itself has taken control of wildlife management, committing much of its energies to the task, and deriving from the program substantial revenues used to provide governmental services.

In sum, New Mexico's attempted regulation falters on the "independent barrier" prohibiting interference with "the Tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue, supra*, slip op. 4-5; *White Mountain Apache Tribe* v. *Bracker, supra*, 448 U.S. at 142-143. See, also, *Williams* v. *Lee*, 358 U.S. 217 (1959); *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971).

C. State Regulation Of Hunting And Fishing On Reservation Tribal Lands Is Pre-Empted By Federally Sanctioned Comprehensive Tribal Regulation

What is more, the State's interference seriously undermines *federal* policy. We have already seen that, as a general matter, Congress has quite pointedly exempted Indian trust lands and their wildlife from State regulation, while, at the same time, confirming tribal authority in that respect. But, in this case, there is much more: very substantial federal investment of money and personnel, provision of an elk herd and a fish hatchery, approval of the tribal ordinances, and continuing assistance and advice. It is no exaggeration to say that the United States has given its full imprimatur to the tribal program. In these circumstances, the tribal regulations properly may be accorded the pre-emptive force of federal law. See *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976); *United States* v. *Mazurie*, *supra*, 419 U.S. at 556-557.

Certainly, the detailed wildlife conservation and management program is "comprehensive" and "pervasive." See *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 148. It is manifest that here, also, "no room remains for state laws imposing additional burdens," and that, even more directly than the taxes held impermissible in recent cases, the superimposition of State regulation "could * * * disturb and disarrange the [federally approved] plan." *Warren Trading Post Co.* v. *Arizona Tax Commission*, *supra*, 380 U.S. at 690, 691; *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 152; *Central Machinery Co.* v. *Arizona Tax Commission*, *supra*, 448 U.S. at 166; *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, *supra*, slip op. 11. Accordingly, State regulation is pre-empted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 398485 1278